

The record on appeal is the same as that considered by the ALJ and consists of the transcript of the February 27, 2007, Post-Award Medical Hearing and the exhibits, the transcript of the May 1, 2007, deposition of Dr. Steven L. Hendler and the exhibits, and the

transcript of the April 19, 2007, deposition of Dr. Michael Zafuta and the exhibits, together with the pleadings contained in the administrative file.

### **ISSUES**

Claimant requests review of the ALJ's finding that claimant's medical treatment for his left knee was unauthorized. Claimant argues that the medical treatment and surgery on his left knee should be paid as reasonable and necessary despite respondent's refusal to authorize the treatment in advance.

Respondent argues that claimant failed to sustain his burden of proving that his left knee condition was related to his work injury. Respondent further requests the Board affirm the ALJ's decision that claimant failed to present evidence that he sought authorization for treatment of his condition from respondent in a timely manner.

The issues for the Board's review are:

- (1) Was claimant's injury to his left knee a direct natural consequence of his work-related low back injury?
- (2) If so, is respondent responsible for payment of claimant's past medical treatment for his left knee injury as authorized or as unauthorized medical treatment?
- (3) Is claimant entitled to an award for additional authorized medical treatment?

### **FINDINGS OF FACT**

Claimant injured his back while working for respondent on February 13, 2003. As a result of that injury, he had two surgeries to his back, including a fusion, and has nerve damage and problems with mobility. He was diagnosed with S-1 radiculopathy. An Award was entered on May 9, 2005. That Award was appealed to the Board. On October 31, 2005, the Board held in part: "Claimant is awarded future ongoing medical benefits for conservative treatment only. Claimant is required to seek authorization for medical benefits other than conservative treatment."<sup>1</sup> Claimant's authorized treating physician was Dr. Steven Hendler.

Since his work-related accident, claimant has had problems down his right leg as a result of the nerve damage. This interferes with his ability to ambulate. His right leg is weak and gives out on him. As a result of this, he has put more weight on his left leg since

---

<sup>1</sup> *Johnson v. Brooks Plumbing*, No. 8,000,139, 2005 WL 3030772 (Kan. WCAB Oct. 31, 2005).

his accident. In late October or early November 2005, claimant was walking across a driveway to his truck when he started to fall because his right leg gave way. He tried to catch himself, and his left knee buckled.

Claimant saw Dr. Michael Zafuta, an orthopedic surgeon, on December 1, 2005, concerning problems he was having with his left knee as a result of the incident in late October or early November. Claimant told Dr. Zafuta that his left knee had gone out while walking, and he felt a tearing sensation. Claimant reported that he had swelling and pain in the knee. Upon examination, Dr. Zafuta found claimant had effusion in his knee, was tender along his medial joint line, had a markedly positive McMurray maneuver on the medial side of his knee, and had no ligamentous laxity. Dr. Zafuta felt claimant had a medial meniscal tear.

Dr. Zafuta next saw claimant on December 8, 2005. He found claimant was unchanged from his first examination and scheduled him for surgery on his left knee. On January 31, 2006, Dr. Zafuta performed a left knee arthroscopy and a partial medial menisectomy. Claimant had a medial meniscal tear and a lateral meniscal tear, and the cartilage that covers the end of the bone had been damaged as well.

Dr. Zafuta opined that claimant's back problem led to his left knee injury because claimant had given him a history of having to walk abnormally on his right lower extremity, which caused increased pressure on his left knee and caused that to give out. He said the ambulatory problem claimant was having on his right was secondary to his previous back injury. Dr. Zafuta released claimant from treatment on April 13, 2006. He did not anticipate a need for future treatment for claimant's left knee.

Dr. Steven Hendler, who is board certified in physical medicine and rehabilitation, is the authorized treating physician for claimant. He had been seeing claimant about every three months since 2004 for pain management. Claimant had complained in January 2005 that he was having an increase in muscle spasms extending down into the right leg, as well as numbness and tingling down the right leg. He was unable to perform toe walking on the right.

Dr. Hendler saw claimant on October 14, 2005, at which time he noted that claimant had an abnormal gait. Claimant had a decrease in toe-off, which represented a slight improvement since Dr. Hendler first started seeing him in 2004. Dr. Hendler next saw claimant on January 13, 2006. At that time, claimant was using crutches. He told Dr. Hendler he was having a problem with his left knee and was scheduled to undergo surgery to repair a torn cartilage. Dr. Hendler did not recall that claimant told him how he injured his left knee, and he did not ask. Dr. Hendler saw claimant on July 17, 2006. After that visit, he received a letter from respondent's attorney dated August 17, 2006, advising him that respondent had denied compensability for claimant's left knee condition.

Dr. Hendler saw claimant on October 13, 2006, at which time claimant told him that his attorney told him he probably fell because of his nerve problem. Dr. Hendler stated that claimant did have a nerve problem and noted that claimant had pain in the upper lateral aspect of the knee and the medial lower aspect. He sent a report of this office visit to the insurance carrier, after which he received a letter from a claims representative telling him he was only authorized to treat claimant's back problem.

### PRINCIPLES OF LAW

Every direct and natural consequence that flows from a compensable injury, including a new and distinct injury, is also compensable under the Workers Compensation Act. In *Jackson*<sup>2</sup>, the court held:

When a primary injury under the Workmen's Compensation Act is shown to have arisen out of the course of employment every natural consequence that flows from the injury, including a new and distinct injury, is compensable if it is a direct and natural result of a primary injury.

But the *Jackson* rule does not apply to new and separate accidental injuries. In *Stockman*<sup>3</sup>, the court attempted to clarify the rule:

The rule in *Jackson* is limited to the results of one accidental injury. The rule was not intended to apply to a new and separate accidental injury such as occurred in the instant case. The rule in *Jackson* would apply to a situation where a claimant's disability gradually increased from a primary accidental injury, but not when the increased disability resulted from a new and separate accident.

In *Stockman*, claimant suffered a compensable back injury while at work. The day after being released to return to work, the claimant injured his back while moving a tire at home. The *Stockman* court found this to be a new and separate accident.

In *Gillig*<sup>4</sup>, the claimant injured his knee in January 1973. There was no dispute that the original injury was compensable under the Workers Compensation Act. In March 1975, while working on his farm, the claimant twisted his knee as he stepped down from a tractor. Later, while watching television, the claimant's knee locked up on him. He underwent an additional surgery. The district court in *Gillig* found that the original injury was responsible for the surgery in 1975. This holding was upheld by the Kansas Supreme Court.

---

<sup>2</sup> *Jackson v. Stevens Well Service*, 208 Kan. 637, Syl. ¶ 1, 493 P.2d 264 (1972).

<sup>3</sup> *Stockman v. Goodyear Tire & Rubber Co.*, 211 Kan. 260, 263, 505 P.2d 697 (1973).

<sup>4</sup> *Gillig v. Cities Service Gas Co.*, 222 Kan. 369, 564 P.2d 548 (1977).

The claimant in *Chinn*<sup>5</sup>, injured his knee at work. Thereafter, he walked with a limp, which caused his back to become painful. The Kansas Supreme Court held that the separate and distinct back injury occurred as a direct and natural consequence of the work-related injury to claimant's knee and was compensable under the Workers Compensation Act as part of the original work injury.

When a primary injury under the workmen's compensation act is shown to have arisen out of the course of employment every natural consequence that flows from the injury, including a new and distinct injury, is compensable if it is a direct and natural result of a primary injury.<sup>6</sup>

Compensation is allowable for disability from a second and distinct injury to a workman where it can be traced to a covered accident through a primary injury. The fact that the primary injury is scheduled does not bar compensation for general bodily disability where a new, distinct, and disabling injury is a direct and natural result of the primary injury.<sup>7</sup>

K.S.A. 2006 Supp. 44-510h states in part:

(a) It shall be the duty of the employer to provide the services of a health care provider, and such medical, surgical and hospital treatment, including nursing, medicines, medical and surgical supplies, ambulance, crutches, apparatus and transportation to and from the home of the injured employee to a place outside the community in which such employee resides, and within such community if the director, in the director's discretion, so orders, including transportation expenses computed in accordance with subsection (a) of K.S.A. 44-515 and amendments thereto, as may be reasonably necessary to cure and relieve the employee from the effects of the injury.

. . . .

(b)(2) Without application or approval, an employee may consult a health care provider of the employee's choice for the purpose of examination, diagnosis or treatment, but the employer shall only be liable for the fees and charges of such health care provider up to a total amount of \$500. The amount allowed for such examination, diagnosis or treatment shall not be used to obtain a functional impairment rating. Any medical opinion obtained in violation of this prohibition shall not be admissible in any claim proceedings under the workers compensation act.

---

<sup>5</sup> *Chinn v. Gay & Taylor, Inc.*, 219 Kan. 196, 547 P.2d 751 (1976); see *Casco v. Armour Swift-Eckrich*, 283 Kan. 508, 154 P.3d 494 (2007).

<sup>6</sup> *Chinn*, 219 Kan. 196, Syl. ¶ 1.

<sup>7</sup> *Id.*, Syl. ¶ 2.

### ANALYSIS AND CONCLUSION

Here, the Board finds this circumstance to be more akin to that found in *Chinn* rather than *Stockman*. Claimant's back condition, while improved, had not completely resolved. Claimant told Dr. Hendler and Dr. Zafuta that he continued to experience radicular symptoms in his right leg and was having difficulties ambulating.

There is often a very fine line between what would be described as a new and separate accidental injury versus a natural consequence of the original injury. In this instance, the Board finds that claimant's condition is a natural consequence of the original injury with respondent. Accordingly, the Board affirms the ALJ's finding that claimant's fall and resulting left knee injury is compensable.

The Board further agrees with the ALJ's analysis and conclusion that Dr. Zafuta's past treatment was unauthorized and is, therefore, subject to the \$500 maximum contained in K.S.A. 2006 Supp. 44-510h(b)(2).

Finally, claimant is entitled to future medical care and treatment of both his back and left knee injuries. As such, the Board affirms the ALJ's order that "respondent and insurance carrier shall provide any additional conservative treatment the claimant may require for the left knee injury through Dr. Hendler."<sup>8</sup>

### AWARD

**WHEREFORE**, it is the finding, decision and order of the Board that the Post Award Medical Order of Administrative Law Judge Kenneth J. Hursh dated May 30, 2007, is affirmed.

**IT IS SO ORDERED.**

---

<sup>8</sup> ALJ Post Award Medical Order (May 30, 2007) at 3.

Dated this \_\_\_\_\_ day of September, 2007.

\_\_\_\_\_  
BOARD MEMBER

\_\_\_\_\_  
BOARD MEMBER

\_\_\_\_\_  
BOARD MEMBER

c: Timothy A. Short, Attorney for Claimant  
Troy A. Unruh, Attorney for Respondent and its Insurance Carrier  
Kenneth J. Hursh, Administrative Law Judge